No. 86-481 (3)

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND
and
EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Petitioners,

v.

WHITWORTH BROS. STORAGE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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The petitioners Central States, Southeast and Southwest Areas Pension Fund ("the Pension Fund"), the Pension Fund's Board of Trustees and Executive Director (all petitioners hereinafter collectively "Central States") respectfully submit this reply brief to demonstrate that the arguments raised by the respondent Whitworth Bros. Storage Company ("Whitworth") in its Brief in Opposition to Petition for a Writ of Certiorari ("Opp.") are entirely without merit.

First, Whitworth admits that the decision of the Sixth Circuit in the present case conflicts with the decision of the Eleventh Circuit in *Dime Coal Company, Inc.* v. *Combs*, 796

F.2d 394 (11th Cir. 1986). Nevertheless, stating merely that "only two Circuits [are] in conflict," Whitworth asserts that review by this Court of the question presented — whether an employer has a federal-common-law action for restitution of contributions made, allegedly by mistake, to an employee benefit plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.*[1] — would be "premature." Opp. at page 16. This Court, however, has not required that a conflict involve three or more federal courts of appeals in order for an issue to warrant review. To the contrary, the Court frequently has granted a writ of certiorari to resolve a conflict between two circuits on an important issue. *See, e.g., Celotex Corp.* v. *Catrett*, ____ U.S. ____, 106 S.Ct. 2548, 2551 (1986); *United States* v. *Hughes Properties, Inc.*, ____ U.S. ____, 106 S.Ct. 2092, 2096 (1986). Moreover, prompt resolution by this Court of the present conflict is critically important to ERISA-governed multiemployer employee benefit plans which, as a result of the conflict, are currently subject to disparate standards depending upon the circuit within which the issue is raised.[2]

Second, Whitworth has not disputed the validity of the decisions of this Court with which the Sixth Circuit's decision

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[1] It should be noted that Whitworth has not directly addressed this issue, but rather has asserted that the remedy it seeks is implied by ERISA § 403(c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii), and that "[f]ederal common law allows Whitworth Bros. to bring suit to enforce the statutory remedy. . . ." Opp. at page 14. Whitworth does acknowledge, as it must, that the Sixth Circuit rejected the "implied right of action" argument in section II.B. of its opinion in this case. Opp. at page 5.

[2] This is not merely an academic point. The petitioner Pension Fund operates in the Eleventh Circuit, *see Sharron* v. *Amalgamated Insurance Agency Services, Inc.*, 704 F.2d 562 (11th Cir. 1983) (the Pension Fund's subsitution as defendant is noted in n.1 of the opinion), and the United Mine Workers of America Health and Retirement Funds, whose trustees were the defendants in *Dime Coal*, operate in the Sixth Circuit, *see Norman* v. *United Mine Workers of America Health and Retirement Funds*, 755 F.2d 509 (6th Cir. 1985).

in the present case conflicts in principle,[3] and its attempt to distinguish these decisions is based upon an apparent misunderstanding of ERISA and its history. Whitworth claims to be different from the parties who unsuccessfully asserted federal-common-law remedies in *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, 451 U.S. 77 (1981), and *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), stating that, unlike those parties, Whitworth "has not been guilty of wrongful conduct," whereas "Central States, on the other hand, has acted wrongfully. . . ." Opp. at page 10. Not only has Whitworth failed to show why such a distinction warrants a different result, but Whitworth also is simply wrong, as a matter of law, in its contention that Central States has acted wrongfully. To the contrary, as Central States shall demonstrate herein, for nearly half of the time ERISA has been in effect, an employee benefit fund faced with a request for a return of contributions such as made by Whitworth would have acted *wrongly* — that is, contrary to the statute — only *if it gave the refund.*

Ever since ERISA was enacted, § 403(c)(1), 29 U.S.C. § 1103(c)(1), has provided that, except as specifically and narrowly allowed, "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."[4] One such limited exception which was

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[3] Those cases stand for the principle that the federal courts may formulate federal common law only under limited circumstances which do not exist when Congress has enacted a comprehensive legislative scheme.

[4] Similarly, ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), which with § 403 is contained in ERISA's Part 4 regarding fiduciary duties, provides in pertinent part that

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and

included in ERISA as it was originally enacted was § 403(c)(2)(A), 29 U.S.C. § 1103(c)(2)(A), which provided: "In the case of a contribution which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution."[5] It has long been recognized that a mistake concerning whether an individual is an employee covered by the applicable collective bargaining agreement, and thus whether his employer is required to make contributions to a benefit plan on his behalf, is a mistake of law, not fact. *See, e.g., Martin* v. *Hamil*, 608 F.2d 725 (7th Cir. 1979). Thus, from 1975 through 1980, a refund by Central States of the contributions requested by Whitworth was absolutely prohibited and would have constituted a violation of the fiduciary duties imposed under ERISA; a refusal of such a request, therefore, could hardly be characterized as wrongful. ERISA, as amended by MPPAA, currently *permits* the return of such contributions under certain circumstances but does not require a refund or make a denial of a request for a refund wrongful or actionable.

Finally, both parts of Whitworth's dual argument that "[t]here is no evidence that refunds of the money that Whit-

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(ii) defraying reasonable expenses of administering the plan. . . .

[5] Since the amendment of ERISA by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), ERISA § 403(c)(2)(A)(i) similarly has provided: "In the case of a contribution . . . made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution. . . ." 29 U.S.C. § 1103(c)(2)(A)(i). MPPAA also added to ERISA § 403(c)(2)(A) a new subsection (ii), which provides in pertinent part that in the case of a contribution "made by an employer to a mulitemployer plan by mistake of *fact or law* . . . , paragraph (1) shall not prohibit the return of such contribution . . . to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake." 29 U.S.C. § 1103(c)(2)(A)(ii) (emphasis added).

worth Bros. mistakenly paid on behalf of William and Ernest will 'undermine' any pension plan," Opp. at page 18, and that Central States has "undermine[d] the well-being and security of the Whitworth brothers,"[6] Opp. at page 21, are flawed. Because the district court made its decision as a matter of law in response to the parties' briefing on Central States' motion to dismiss, no evidence on *any* matter was or needed to be considered. Further, the suggestion that the availability of an employer's restitution remedy would benefit employees improperly confuses the identity of the employer with the identities of its employees.[7] Moreover, Whitworth's contentions on behalf of two specially situated individuals cannot compare in importance to the congressionally recognized need to protect and preserve employee benefit plans in the interest of their participants and beneficiaries.

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[6] Throughout its Brief in Opposition, Whitworth repeatedly asserts that William and Ernest Whitworth are not entitled to pensions. Not only is such an allegation absent from the complaint in this action, but it is irrelevant to employer Whitworth's attempt to force a refund of contributions allegedly made by mistake.

[7] Whitworth at page 14 of its Cross Petition for a Writ of Certiorari more directly states: "In this instance the employer (Whitworth Bros.) is not suing as an employer to obtain money for corporate use, but on behalf of the employee-co-owners (Whitworth brothers) to return to them their money paid on the mistaken belief that they, as employees, were covered by the collective bargaining agreement." The asserted representational relationship is not alleged in the complaint in the present case and is irrelevant as to whether a cause of action exists generally for an employer to recover contributions made allegedly by mistake.

CONCLUSION

For the foregoing reasons and for the reasons stated in Central States' Petition for Certiorari, this Court should grant the petition and review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this action.

Respectfully submitted,

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